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Subject: Wyoming Usage Fees

The Service needs to nail down the subsidiary lien priority question. The levy issue is easy. There are only two defenses to a levy action. Unless it is not the taxpayer's property, or unless the proceeds are subject to judicial attachment, must remit the withheld funds (including the 4% to the Service). See U.S. v. National Bank of Commerce, 472 U.S. 713 (1985). A claim of lien priority is not a defense to levy. However, it would not be efficient for the Service to receive the property only to have the state of Wyoming sue on the lien. Accord Rev. Rul. 2006-42.

For all creditors not listed in section 6323 (e.g., a state taxing authority), priority is determined under the judicial doctrine of choateness, under which first in time is first in right. See U.S. v. City of New Britain, 347 U.S. 81 (1954). A state-created lien arises when the state takes administrative steps to fix the taxpayer's liability. If there was no state tax assessment, which your stated facts seem to suggest, then the state's interest would not prime the government's interest under section 6323. The date of demand letter would be immaterial. See Minnesota v. U.S., 184 F.3d 725 (8th Cir. 1999); City of New Britain, 347 U.S. 81. You likely can work this out via a conference call that would include a representative of and the contact representative for the state.

A good starting point would be the GL-1 lessons. Here is the blurb from lesson 4, Priority of Federal Tax Lien (1/2009), regarding competing state tax liens.

D. State Tax Liens

1. **Basic Rule:** A state or local tax lien is entitled to priority over a federal tax lien only if it is a choate lien prior to the time the federal tax lien arises. United States v. City of New Britain, 347 U.S. 81 (1954). But see In re WPG, Inc., 282 BR 66 (D.D.C. 2002) (District of Columbia sales tax lien had superpriority over prior choate federal tax lien in Chapter 11 bankruptcy case, where D.C. superpriority statute constituted federal law).
 - a. A state's characterization of its tax liens as choate is not conclusive for federal tax lien purposes. Illinois ex. rel. Gordon v. Campbell, 329 U.S. 362 (1946). See also In Re Priest, 712 F.2d 1326 (9th Cir. 1983), mod. 725 F.2d 477 (1984), holding a state law ineffective which stated that a tax lien arose when the tax return was "due and payable" on the

date the return was required to be filed. A state-created lien arises when the state takes administrative steps to fix the taxpayer's liability - mere receipt of a tax return is insufficient. Minnesota v. United States, 184 F.3d 725 (8th Cir. 1999).

- b. State and local tax liens cannot achieve priority over the Federal tax lien by being characterized under state law as judgments. United States v. Gilbert Associates, Inc., 345 U.S. 361 (1953).
 - c. Real property taxes and special assessments may be entitled to superpriority status under section 6323(b)(6). However, a state law which characterizes a state lien as having priority or superpriority status is not controlling.
2. When does a state tax lien become choate? Under City of New Britain, supra, it becomes choate when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.
- a. The identity of lienor requirement is met when the tax is assessed.
 - b. The specificity of amount requirement is met when the assessed tax is enforceable by levy.
 - c. The specificity of the property subject to the lien is the most difficult requirement to meet.
 - d. Despite the common origin of the choateness requirements, the Supreme Court held in United States v. Vermont, 377 U.S. 351 (1964), that divestiture of title or possession did not apply in lien priority contests. Thus, a local tax lien enforceable without a judicial proceeding and attaching to "all property and rights to property, whether real or personal, belonging to" the taxpayer, will prevail over a subsequently arising federal tax lien even though the local tax lien has not been enforced by seizure or sale.
3. **Priority determination.** In determining priority between a federal tax lien and a local tax assessment, compare the date the federal tax lien was assessed with the date the local tax assessment was filed. If the local tax was first, then look at the taxing statute to ascertain whether it is choate in the federal sense.
4. Another example of a competing lien which must meet the choateness test to take priority over a subsequent federal tax lien is

a lien given under local law for unpaid rent (**landlord=s lien**). This lien attaches to tenant's or lessee's property located on landlord's premises.